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Supreme Court of the United States

OCTOBER TERM, 1956

WILLIAM H. BLACK and RUTH F. BLACK, *Petitioners*,

v.

A. M. AMEN; H. C. WADLEIGH; ELLEN WADLEIGH; T. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER I. BERGLUND; FRED O. BROWN; WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. McBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HUGH D. STITES and LARRY STITES, infants under the age of twenty-one years, by Lois L. STITES, their mother and next friend; KENNETH D. CONSTANT; HAZEL CONSTANT; J. R. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER and FRED E. WINDISH; Co-RECEIVERS OF BLACK-MARSHALL OIL COMPANY, a corporation, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Supreme Court of the United States

OCTOBER TERM, 1956

No. 346

WILLIAM H. BLACK and RUTH F. BLACK, *Petitioners,*

v.

A. M. AMEN; H. C. WADLEIGH; ELLEN WADLEIGH; T. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER I. BERGLUND; FRED O. BROWN; WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. MCBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HUGH D. STITES and LARRY STITES, infants under the age of twenty-one years, by LOIS L. STITES, their mother and next friend; KENNETH D. CONSTANT; HAZEL CONSTANT; J. R. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER and FRED E. WINDISH; CO-RECEIVERS OF BLACK-MARSHALL OIL COMPANY, a corporation, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Respondents' Brief in Opposition has brilliantly achieved a principal object of adversary proceedings—the production of a clear and precise issue. We do not refer to that half of the brief which wearily attempts to restate the findings of the District Court,

choosing to stand without further comment upon our own brief, which gave this Court the facts bearing on the issues presented. Argument on the substantive issues, as perceived by respondents, would hardly be appropriate at this stage. It is in the jurisdictional issue that respondents, confronted with unmistakable conflict of the decision below with the decisions of this Court and of the Court of Appeals for the Second Circuit, have been driven to the position of confession and avoidance. This is progress.

The present proceeding—says the Brief in Opposition—is not what the Petition claims it is. It is not, so say respondents, a "class" action described by Section 23(a)(3) of the Federal Rules where the causes of action are separate and independent, where the principle of res adjudicata does not apply to members of the class who do not intervene and where each intervener must establish the basis of federal jurisdiction. (Brief in Opp., pp. 21-28.) Rather, so they claim now, it has its face, and its status, lifted to that of a "hybrid" class action described in Section 23(a)(2), one involving the disposition of "interdependent" claims "against a fund held in constructive trust" (p. 25) and thus akin to a creditor's bill for the appointment of a receiver, where, once federal jurisdiction is established, interveners in ancillary proceedings need not establish diversity of citizenship or the jurisdictional amount. They find comfort and support in an alleged similarity to *Dickinson* v. *Burnham*, 197 F.2d 973 (2d Cir. 1952), cert. denied, 344 U.S. 875, in which the Court—unhappily for them—said, "we are quite clear that the present suit falls neatly within subdivision (2) of the rule, dealing with the disposition of a fund." (197 F. 2d at 979).

Now the difficulty with the defense called confession and avoidance is that if the avoidance fails to avoid, the confession bites deep. Nor is this the first confession. Before the Court of Appeals respondents described the proceeding in this way:

> "In the present cases, substantially the same representations were made by the same individual with respect to the same transaction and at approximately the same time. . . . *the inquiry is whether* [this case] *presents common questions of law or fact.* . . . All of the questions of law and fact regarding Black's liability are common questions. . . . The present cases, therefore, are clearly within the authority of Rule 23(a)(3)." (Appellants' Reply Brief, p. 4.) (Emphasis added.)*

And the Court of Appeals also described the proceeding as one where the claims were quite separate and distinct:

> "A preliminary question is whether the claims of the appellant stockholders may be maintained as a spurious action under Rule 23(a)(3) . . . The appellees challenge the propriety of the suit as such on the grounds that the claims being independent and based upon separate and distinct allegations of fraudulent representations, are not maintainable in one action.
>
> "The original complaint alleged requisite diversity of citizenship and amount in controversy and these jurisdictional elements are unchallenged.

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* Respondents' suggestion that Rule 23(a)(3) also embraces hybrid-type actions (pp. 26-27) fails to hide their embarrassment in switching sub-categories of Rule 23 at this stage. In all suits under 23(a)(3) "there is no jural relationship between the members of the class . . . The right or liability of each is distinct. The class is formed solely by the presence of a common question of law or fact." (3 Moore, Federal Practice 3443 (2d ed. 1948).)

> The other appellants are either parties plaintiff or interveners in one of the consolidated actions over which the court had jurisdiction. And *while their claims and demands were separate,* they alleged substantially the same facts and sought common relief. . . . this very situation was in the minds of the drafters when Rule 23(a)(3) was adopted." (Pet. Appendix, pp. 51-52.) (Emphasis added.)

It is quite true, as respondents point out (p. 22), that petitioners did not discuss the *Dickinson* case. Other cases not in point also were not discussed. Any similarity between *Dickinson* and the case now before this Court is supplied purely by the ingenuity of respondents. That case was one of a class action under Rule 23(a)(2) where non-intervening members of the class, it was held, would be bound by the judgment and so need not prove diversity of citizenship in order to come in to preserve their rights. The stockholders sued not as such but as subscribers to a specific fund, known as the Rinke Agency Funds, established to aid the corporation in its financial difficulties. (197 F.2d at 975.)* The relevant Conclusion of Law reached by the trial court was:

> "IX. The claim of the interveners . . . in behalf of themselves and all other Rinke Agency subscribers . . . for the recovery of [specified sum and interest] fraudulently paid to Dickinson and Lloyd out of the Rinke Agency Funds . . . is sustained." (11 Fed. Rules Serv. 489, 490.)

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* Actually Burnham and Vaughan intervened (alleging and proving the necessary jurisdictional facts) asserting the hybrid class action in a suit brought by Dickinson against Rinke. After a judgment in their favor, members of the class represented by them were allowed to intervene, without jurisdictional averments, to obtain their portion of the fund already held to belong to such class.

The interdependent nature of the claims is readily seen from the Second Circuit opinion:

> "The district judge stated the formula of recovery which he applied thus: 'A final decree should be entered according to each intervener claimant . . . in an amount which shall bear *the same ratio* [to the misappropriated funds] as the amount of the intervener's claim bears to the total of the claims of the interveners allowed by the Court.
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> * * *
>
> "Although none of the contributors has been paid in full, *no one*, and certainly not [Dickinson], *now asserts or suggests that they should have full recovery from him as on an ordinary tort liability for conspiracy and defrauding.* The court's power of disposition over the fund was therefore absolute and final." (197 F.2d at 978, 980.) (Emphasis added.)

The *Dickinson* opinion, rather than aiding respondents, only underlines the separateness of the instant claims. Here, plaintiffs are to be paid in full. Here, recovery *is based* on an ordinary tort liability for defrauding. Here, "the successful appealing shareholders" are said to be "entitled to money judgments against Black equal to the values of their equitable stockholdings in Black-Marshall sold to NCRA in 1947, less sums already received" (Pet. Appendix, p. 68), a formula resulting in the same fixed, absolute amount to each claimant regardless of the number of claimants.

Any notion that the *Dickinson* case authorizes alleged victims of a fraud or other wrongs simply to label the fruits of the wrong a "fund" in order to maintain a hybrid action was dispelled by the same court in a later opinion, *Rock Drilling, Blasting, etc.* v. *Mason & Hanger Co.*, 217 F.2d 687 (2d Cir. 1954),

cert. denied, 349 U.S. 915. The complaint was brought on behalf of some 400 union members for damages sustained as a result of a conspiracy to bribe an officer of their international, but was dismissed *inter alia* for failure of any one member to show the requisite jurisdictional amount. Even the willingness to reduce the amount of aggregate damages to a sum equal to the amount of the bribe itself could not change the spurious nature of the class action:

> "By asserting 'unjust enrichment' in the amount of the bribe, reducing the ad damnum clause from $600,000 to $36,000, as 'at least' the amount of the aggregate damage, and calling this a 'fund' to which plaintiff [union] is entitled 'as trustee,' plaintiff has merely added verbiage. There is no fund. The claim remains one on behalf of 400 separate individuals for the damage suffered by each due to the alleged tortious conduct of defendant. . . .
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> * * *
>
> ". . ., what is plainly a series of separate and distinct claims cannot be transmuted into 'a single title or right' by the mere expedient of asking for less damages than each would be entitled to were he to have sued alone and casting the prayer for relief in the form of a declaratory judgment proceeding affecting the disposition of a so-called 'fund'." (217 F.2d at 695.)

Petitioners need not dwell long on respondents' assertion that "by the express provision of Rule 82, whether a class suit is 'true,' 'hybrid' or 'spurious' under Rule 23(a) cannot change the jurisdictional requirement for intervention." (p. 27.) Rule 82 can speak for itself. It states in full:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

This, of course, is petitioners' whole point. The permissive joinder device of Rule 23(a)(3) cannot be utilized to extend federal jurisdiction. Trial convenience may warrant the disposal in a single spurious class action of questions ordinarily resolved in separate suits, but it cannot override the familiar jurisdictional rules for the joinder of multiple parties.

In sum, the Brief in Opposition brings into sharp focus the issue on this jurisdictional point. Which is the correct statement of the legal characteristics and consequences of this proceeding, upon which rests the necessity for each intervener to show diversity of citizenship—that of the petitioners, with which both the respondents in the court below and that court agreed, or the new and revised statement of respondents which here attempts to change the basic nature of the case?

The Brief also points to an additional reason for this Court to review the decision below.

It not only, in essence, concedes, indeed highlights, the conflict between this decision and those of the Second Circuit and this Court, but brings out the importance of resolving it. For only by continuous and specific insistence on the part of this Court will the lower courts be spurred to that strict analysis of proceedings before them upon which rests the mainte-

nance of the constitutional limitations upon federal jurisdiction.

Respectfully submitted,

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